No. 772

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

THE NEW YORK TRUST COMPANY, as the Trustee under the Debenture Agreements between it and THE UNITED LIGHT AND POWER COMPANY; MARY A. WALDRON, FREDERICK H. BRUNNER, AMERICAN EQUITABLE ASSURANCE COMPANY OF NEW YORK, KNICKERBOCKER INSURANCE COMPANY OF NEW YORK, NEW YORK FIRE INSURANCE COMPANY, MERCHANTS AND MANUFACTURERS INSURANCE COMPANY OF NEW YORK, and AMERICAN RESERVE INSURANCE COMPANY,

Petitioners,

—against—

SECURITIES AND EXCHANGE COMMISSION and THE UNITED LIGHT AND POWER COMPANY,

Respondents.

BRIEF FOR RESPONDENT, THE UNITED LIGHT AND POWER COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

DONALD R. RICHBERG,
PARK CHAMBERLAIN,
JOHN DERN,
Attorneys for Respondent,
The United Light and Power Company.

INDEX

Table of Cases

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

THE NEW YORK TRUST COMPANY, as the Trustee under the Debenture Agreements between it and THE UNITED LIGHT AND POWER COMPANY; MARY A. WALDRON, FREDERICK H. BRUNNER, AMERICAN EQUITABLE ASSURANCE COMPANY OF NEW YORK, KNICKERBOCKER INSURANCE COMPANY OF NEW YORK, NEW YORK FIRE INSURANCE COMPANY, MERCHANTS AND MANUFACTURERS INSURANCE COMPANY OF NEW YORK, and AMERICAN RESERVE INSURANCE COMPANY,

Petitioners,

—against—

SECURITIES AND EXCHANGE COMMISSION and THE UNITED LIGHT AND POWER COMPANY,

Respondents.

BRIEF FOR RESPONDENT, THE UNITED LIGHT AND POWER COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Opinions Below

The Findings, Opinion and Order of the Securities and Exchange Commission appear at pages 294-318 of the Record.

The opinion of the United States Circuit Court of Appeals for the Second Circuit affirming the order of the Commission appears at pages 320-325 of the

Record. It is reported in 131 F. (2d) 274 (Adv. Op.); and, being short, is reprinted as Appendix A to this brief.

Summary Statement of the Matter Involved

The petitioners' statement and exposition of the questions presented are so lengthy and confused that we think a summary presentation would be useful to the Court.

On March 20, 1941, the Securities and Exchange Commission, in a proceeding which had been instituted by it, found that the liquidation and dissolution of The United Light and Power Company were necessary to comply with Section 11(b) (2) of the Public Utility Holding Company Act of 1935. (R. 109) The Commission so ordered; and by its order also required the Company to make application to the Commission for the entry of any further orders necessary or appropriate to effect such liquidation and dissolution. (R. 116) *No appeal was taken from that order.*

The Company proceeded to comply with the order and, with the approval of the Commission in each instance, completed a series of transactions which were necessary to enable it to carry out its liquidation. As a result, the Company was able to obtain sufficient funds to pay off its debentures in cash. The Company then filed Application Number 8 in which it proposed a plan for the payment of its debentures in cash at their principal amount, plus accrued interest to May 1, 1942. (R. 177-242) These debentures were subject to redemption *at the election* of the company at any time prior to maturity by payment of principal and accrued interest, plus a diminishing premium, which would have been 9% of principal at the time of proposed payment. (R. 226) The company took the position in its application that, since payment of the deben-

tures was compulsory and not "at the election of the company", no premium should be paid.

On February 25, 1942, the Commission, by unanimous opinion, approved the Application, finding (a) that payment of the debentures was necessary to effectuate the provisions of Section 11(b) (2) of the Act and to enable the Company to liquidate and dissolve in compliance with the order of March 20, 1941, and (b) that payment in the manner proposed was fair and equitable to all persons affected. (R. 294-315)

Petitioners obtained a review of the order in the Circuit Court of Appeals for the Second Circuit and contended that the premium payable on voluntary redemption (or an amount equivalent thereto) should be paid in addition to the principal and accrued interest. That court, by unanimous opinion, affirmed the order of the Commission. (Opinion copied in Appendix A)

Controlling Facts

1. The order of March 20, 1941, was not appealed and is not now subject to review.[1] Therefore, the *necessity* of taking appropriate steps to liquidate and dissolve the Company; and the power of the Commission to enter the order of March 20th, cannot now be questioned.

2. Neither the debentures nor the debenture agreements contained any provision requiring any

[1] "Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part." (Public Utility Holding Company Act of 1935, Section 24)

payment in excess of principal and accrued interest in the event of involuntary dissolution. (R. 220-242) The Company had the "right" or "option" to pay the debentures prior to maturity if it voluntarily "elected to redeem" them; and in that event a correlative right arose in the debenture holders to be paid a premium. (R. 228, 231) The liquidation and dissolution is clearly involuntary, being under compulsion of the Act and the order of March 20, 1941. The Company has not elected to redeem and therefore no contractual right of the debenture holders to a premium has arisen. (See Findings and Opinion of Commission, R. 304-306)

3. The right of the debenture holders to retain their debentures until maturity, like the right of the Company to retain and use the creditors' money until maturity, depended on the right of the Company to exist. When the sovereign power of the State ended the Company's right to exist, these dependent rights necessarily ceased to exist.

Questions Involved

The only questions involved are, *first*, whether payment of the debentures was "necessary" to enable the Company to liquidate and dissolve in compliance with the Commission's order of March 20, 1941; and, *second*, whether payment of the debentures at their principal amount, plus accrued interest, was fair and equitable to the debenture holders and the stockholders of the Company.

Both of these questions were properly decided in the affirmative by the Commission and the Court below. These questions involve merely the application of well-recognized legal principles which have been clearly established by this Court. The court below correctly applied these principles and its decision is not in con-

flict with the decisions of this Court or with those of other courts.

Petitioners imply that there *might* be a conflict with the decision of a case pending in the Seventh Circuit (Petition, p. 10); but the United States Circuit Court of Appeals for the Seventh Circuit handed down its decision of that case on March 5, 1943, and expressly agrees with the decision of the Second Circuit in the present case. We quote a part of that opinion hereafter (p. 12).

The other questions presented by the petitioners and their arguments with respect thereto are irrelevant. In substance, they relate to and constitute an attack upon the validity of the order of March 20, 1941, which is not now subject to review.

ARGUMENT

I

A Review of the Decision Below Is Not Warranted on the Ground That It Involves Important Questions of Federal Law Which Have Not Yet Been Settled by This Court

Was Payment of Debentures "Necessary"?

The argument that payment of the debentures was not "necessary" is without substance. The company had been ordered to liquidate and dissolve. To do so it must either pay its debts or provide for their assumption by some other party. The Commission specifically found that payment was necessary and that an assumption by any other party was not feasible and would not be permissible under the provisions of the Act. (R. 299-301) This finding was based upon competent and substantial evidence and no evidence justifying a contrary conclusion was presented by pe-

titioners or any other party. Furthermore, Section 24(a) of the Act provides that "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." A determination that it is necessary for a company to pay its debts in order to liquidate and dissolve does not present any doubtful or important question of federal law which requires a decision of this Court.

Was Payment Without Premium "Fair and Equitable"?

This question involves a determination of what is fair and equitable treatment of creditors when, by governmental action, a debtor is required by law to pay, and creditors are required by law to accept payment of, an indebtedness prior to the stipulated maturity date. This calls for an analysis of the contract between the parties to determine their contractual or legal rights and a study of all other facts and circumstances to determine whether there are any equitable factors which require a departure from the contractual or legal rights. This question does not involve novel principles or doubtful issues of public importance.

Neither the debentures nor the debenture agreements provided for the payment of any premium upon a dissolution of the Company. (R. 220-242) They provided for the payment of a premium only in case the Company should voluntarily *elect to redeem* the debentures. (R. 228, 231) The Company has been compelled to dissolve by the passage and enforcement of a law which has made its continued existence unlawful. It did not promise to redeem its debentures, nor did it promise to pay a redemption premium, in case the maturity of the debentures should be accelerated by reasons beyond the control of the Company.

The debenture agreements contemplated two pos-

sibilities: First, that the Company, for its own benefit and for the benefit of its stockholders, might voluntarily desire to pay the debentures prior to their stipulated maturity date, in which event the payment of a premium would be required. The second possibility was that the debenture holders (through their trustee) might desire to enforce payment of the debentures prior to their maturity because of a default by the Company, in which event no premium would be payable. (R. 233-237)

The contract is silent as to the rights of the parties in the event maturity should be accelerated by conditions beyond the control of either party. Moreover, the fact that a premium was not intended to be paid on involuntary liquidation is emphasized by the provisions contained in the debenture agreements governing the rights and remedies of the bondholders in the event of default. Under these provisions, when maturity is accelerated because of specified contingencies, whether within or beyond the control of the Company, the Company is not required to pay a premium even though it may have sufficient funds to do so. (R. 237)

These provisions are significant because if the Company had not complied with the order of March 20, 1941, the Commission, under Section 11(d) of the Act, could apply to a court for the appointment of a trustee and the appointment of a trustee would constitute one of the events of default specified in the debenture agreements. (R. 234)

Thus, if we seek by analogy to find whether there is any legal right to a premium to be *implied* from the contract, we find that any such right is denied in all cases of forced payment prior to maturity which are covered in the debenture agreements.

From an analysis of the contract, the conclusion that there is no contract right to a premium is inescapable. The Commission and the Court below so held; and the points involved in construing the contract are not of sufficient importance to require a review by this Court.

There being no contract right to a premium, the question arises whether the debenture holders are entitled to a premium, or other additional compensation, by virtue of some other legal principle. The law on this point has been well established by this Court and was properly applied by the Court below.

The decisions of this Court referred to in the opinion of the Court below clearly establish the legal rights and obligations of contracting parties whenever the performance of contracts is rendered impossible, or unlawful, or when the purpose of the contract has been frustrated by virtue of governmental action.

Under the contract between the parties here involved, the Company acquired the right to retain and use the money borrowed until the stipulated maturity date. As consideration for this right, the Company agreed to pay interest on the funds so used. By virtue of an Act of Congress the performance of this contract in the manner originally contemplated has become impossible (in fact unlawful) and the Company has been deprived of the benefits of its contract. Under these circumstances, the debenture holders, whose period of investment has been terminated by Congressional action, are not entitled to receive interest (or compensation for the loss thereof) after their principal has been repaid to them. This is clearly established by the decisions of this Court referred to in the opinion of the Court below.

If we regard the requirement of the Act that a plan must be "fair and equitable" as stating merely a rule of absolute priority, it follows that the manner in which the debentures were paid was fair and equitable to the debenture holders because they have received full payment in cash of their contract or legal rights.

If we regard the statutory test as one which encompasses equitable as well as legal factors, the Commission also acted properly in finding that there were no equitable factors which justify the payment of a premium. This is clearly demonstrated by the facts in the record.

The debentures were sold to the public below par. (R. 181) Interest at 6% and 6½% per annum was received by the debenture holders without interruption during a period when interest rates generally have steadily fallen. For a period of ten years prior to 1941, the market prices of the debentures were consistently below par and substantially below that figure during a large part of the period. (R. 206-210) It was not until after the Commission's order of March 20, 1941, was entered that the market prices reached par. At that time, it became common knowledge that the Company would be required to pay off its debentures in order to liquidate and dissolve. (R. 103) It was also common knowledge that the Company proposed to pay its debentures in cash at their principal amount, plus accrued interest, as soon as practicable. (R. 103)

The stockholders of the Company have suffered heavy financial losses because of their investment in the Company, while the debenture holders have not suffered any financial loss. Under these circumstances there can be nothing unfair or inequitable in permitting the owners to retain all the assets remaining

after all contractual and legal rights of the debenture holders have been satisfied in full.

Both the stockholders and the debenture holders invested their funds in a company which the Congress subsequently determined must be liquidated and dissolved. In so far as is consistent with proper recognition of contract rights, this burden of Congressional condemnation should be borne equitably by the parties; and the Congress so provided. Up to date, all of the burden has been borne solely by the stockholders. The only "detriment" which has been suffered by the debenture holders is full payment of their investment *in cash* prior to the stipulated maturity date—which may be highly beneficial to most of them.

Under these circumstances, and in the absence of a contractual provision requiring payment of the redemption premium, the Commission and the Court below clearly acted properly in finding that there was no justification for requiring the Company to pay $1,358,000 more to the debenture holders, and thus to further reduce the stockholders' equity.

Findings and conclusions of the Commission as to the existence or non-existence of equitable factors of this type do not involve important questions of Federal law.

The conclusion of the Commission and the Court below that the plan of payment was fair and equitable was supported by substantial evidence and was arrived at by the proper application of well established legal and equitable principles. Accordingly, we do not believe that this Court should grant the petition on the ground that important and undecided questions of Federal law are involved.

In the absence of any doubtful issue of public importance warranting a review by the Supreme Court, we are justified in pointing out that the respondent

has been deprived for a year of the use of $1,358,000, now on deposit in escrow; and that a further deprivation in order to allow an unnecessary review by this Court would add substantially to the loss already caused by petitioners' appeal.

II

A Review of the Decision Below Is Not Warranted on the Grounds That It is in Conflict with the Decisions of This Court or Those of Other Courts.

Petitioners allege that in so far as there are decisions of this Court applicable to the questions involved the decision of the Court below "probably—to say the least—was in conflict with applicable decisions of this Court." (Pet. p. 11)

We believe the reasons already stated clearly demonstrate that there is no such conflict. Petitioners seek to assert a conflict in decisions by ignoring the well recognized distinctions drawn by this Court between cases involving a "bad bargain" and those involving impossibility of performance or frustration due to Governmental action. It is immaterial whether the cases in the latter class be termed an exception to a general rule or whether they themselves announce a general rule. The important point is that they establish a well defined and recognized legal doctrine which is squarely applicable here, whereas the "hard bargain" cases have no relevancy.

Petitioners also assert as a reason for granting the petition the fact that a similar question was pending before the United States Circuit Court of Appeals for the Seventh Circuit. This was true at the time the petition was filed; but since then the case has been decided. That Court, likewise by unanimous opinion,

affirmed a similar order of the Commission in another proceeding, and adopted the reasoning of the Circuit Court of Appeals for the Second Circuit. *City National Bank and Trust Company of Chicago, as successor trustee, etc. v. Securities and Exchange Commission and North American Light & Power Company*, C. C. A. 7th, decided March 5, 1943. An extract from that opinion follows:

> "There can be little, if any, doubt, so we think, but that the provisions concerning redemption had to do solely with voluntary action on the part of the corporation. The debentureholder was without right to require redemption. That was a right accorded to the corporation, to be exercised solely "at the option of the company." It is only upon the exercise of such option that the agreement requires the payment of a premium. Such option lodges in the corporation the discretion to mature the debentures at a date earlier than that otherwise provided. While it is true that the payment of premium was a form of compensation to the debentureholders, nevertheless the redemption provision was for the benefit of the corporation, which could be utilized only at its election. The language plainly indicates that the parties did not contemplate that the redemption provision should be effective upon action by the corporation as a result of the Commission's order. Action under legal compulsion is the antithesis of action by election or "at the option" of the moving party.
>
> "Numerous authorities are cited and discussed relating to the doctrine of impossibility of contract performance and the closely allied doctrine of frustration of purpose. In the recent case of *New York Trust Co., et al v. Securities and Exchange Commission*, 131 Fed. (2d) 274, the court rejected the contention that the contractual provisions for redemption premium were applicable. The questions presented and decided in that case are almost identical with those of the instant case,

and the cases relied upon here were in the main considered. Inasmuch as we agree with both the reasoning and the result in that case, we think no good purpose could be served by a discussion of such cases."

It is clear that there is no conflict between the decisions and that no ground exists for reviewing the decision of the court below on that basis.

III

A Review of the Decision Below Is Not Warranted for Any of the Other Reasons Assigned by the Petitioners.

As already pointed out, the arguments of the petitioners are in large part an attack on the validity of the order of March 20, 1941, which is not now subject to review. The petitioners state that they were not parties to the proceeding at the time the earlier order was entered, and therefore had no opportunity to review it. But they do not deny that they had notice or knowledge of the order. The petitioners, even though they were not parties, had the right to seek a review of the order if they were aggrieved thereby. Section 24 of the Act provides that

> "Any *person or party* aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the Circuit Court of Appeals * * * ."

The petitioners' argument, that compliance with a Commission order can only be effected by one over-all plan and not by a series of steps taken in logical sequence, is neither timely nor realistic. Compliance with the Act is a complex matter and must be effected in a scientific and orderly manner. Any other procedure would result in utter confusion. Those who

feel aggrieved by individual transactions have the right to seek review of Commission orders with respect thereto; but they cannot delay consummation of such transactions merely because others are to follow.

The collateral argument of the petitioners that the debenture holders were discriminated against because the Commission approved the assumption of an issue of the Company's Mortgage Bonds by another system company is equally without merit. The record clearly discloses why it was not necessary to pay the Mortgage Bonds and why payment of the debentures was necessary. (R. 143-174; 294-315) In fact, from the record it is quite apparent that the debenture holders themselves would have been the first parties to object if the Company, having been able to raise sufficient cash to pay off the debentures in full, had proposed to use the cash for any other purpose.

CONCLUSION

The decision below does not involve the construction of any provision of the Act which needs clarification as applied to the facts involved; nor does it involve any important questions of Federal law which have not been decided by this Court. Furthermore, it is not in conflict with any decisions of this Court or with those of other courts.

Therefore, we submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

DONALD R. RICHBERG,
PARK CHAMBERLAIN,
JOHN DERN,
Attorneys for Respondent,
The United Light and Power Company.

March 22, 1943.

APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 6—October Term, 1942

(Argued October 8, 1942, Decided November 12, 1942)

THE NEW YORK TRUST COMPANY, as the Trustee under the Debenture Agreements between it and THE UNITED LIGHT AND POWER COMPANY; MARY A. WALDRON, FREDERICK H. BRUNNER, AMERICAN EQUITABLE ASSURANCE COMPANY OF NEW YORK, KNICKERBOCKER INSURANCE COMPANY OF NEW YORK, NEW YORK FIRE INSURANCE COMPANY, MERCHANTS AND MANUFACTURERS INSURANCE COMPANY OF NEW YORK, and AMERICAN RESERVE INSURANCE COMPANY,

Petitioners,

—against—

SECURITIES AND EXCHANGE COMMISSION AND THE UNITED LIGHT AND POWER COMPANY,

Respondents.

Petition to review an order of the Securities and Exchange Commission. Order affirmed.